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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 832

BEATRICE FOODS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 27–59) is reported at 312 F. 2d 29.

JURISDICTION

The judgment of the court of appeals was entered January 2, 1963. By order of Mr. Justice Brennan dated February 4, 1963, the time for filing a petition for a writ of certiorari was extended to February 27, 1963. The petition was filed on February 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the record contains substantial evidence to support a jury verdict that petitioner violated Section 1 of the Sherman Act by combining and conspiring with others to fix non-competitive prices and discounts on sales of milk to two government installations.

2. Whether the district court's instructions adequately apprised the jury that it could convict petitioner only if it found, beyond a reasonable doubt, that the United States had proved the particular crime charged in the indictment.

3. Whether the district court abused its discretion in denying petitioner's motion for inspection of the grand jury minutes and dismissal of the indictment, when, after examining the minutes *in camera*, the court concluded that the allegations in the affidavit supporting the motion were "not supported by the record and therefore [were] without foundation."

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, is printed in Appendix D to the petition (pp. 81–82).

STATEMENT

Petitioner Beatrice Foods Company ("Beatrice") and co-conspirators Roberts Dairy Company ("Roberts") and Alamito Dairy Company ("Alamito") were engaged in the business of purchasing, processing, bottling and distributing milk and cream in the Omaha, Nebraska-Council Bluffs, Iowa area. On August 28, 1958, a one-count indictment was returned against Beatrice, Roberts, and Alamito charging them

with violation of Section 1 of the Sherman Act (P.F. 1–8)[1] by combining and conspiring to "fix and establish non-competitive prices and discounts for milk and cream sold and distributed" to the Offutt Air Force Base and the Veterans Hospital, located in the Omaha area; and to "allocate to the defendant Roberts, the bid contract business of supplying milk and cream to the Veterans Hospital", while "alternately allocat[ing] to the defendants Alamito and Beatrice the bid contract business" for milk and cream sold to Offutt Air Force Base (Pet. 28, fn. 1; P.F. 5).

After a motion had been denied (Pet. 28; P.F. 25–26) defendants Roberts and Alamito pleaded *nolo contendere,* and each was fined $5,000 (Pet. 28; P.F. 52, 53). Beatrice pleaded not guilty and on May 8, 1961, moved on the basis of an affidavit [redacted] of one of its counsel which asserted misconduct by government attorneys before the grand jury that the grand jury minutes be produced for its inspection and that the indictment be dismissed (Pet. 28–29, 38; P.F. 134–139). The case then went to trial. At the close of the government's evidence, Beatrice moved for a judgment of acquittal. Upon denial of that motion, Beatrice rested, and the jury brought in a verdict of guilty (Pet. 29). A fine of $15,000 was imposed (Pet. 27; P.F. 161). After conviction Beatrice renewed its motions for dismissal of the indictment and for judgment of acquittal, and, in the alternative, asked for a new trial. These motions were denied (Pet. 29; P.F. 177).

[1] "P.F." refers to the pleading file certified to this Court.

The Court of Appeals for the Eighth Circuit affirmed.

ARGUMENT

The petition presents no substantial question warranting review by this Court. Rather, it is devoted to a reargument of the evidence before the jury, the adequacy of the district court's instructions, and the correctness of several of the court's discretionary rulings permitting the introduction of certain evidence and denying petitioner's motion for disclosure of the grand jury minutes.[2] All of these contentions were correctly resolved against petitioner by the Eighth Circuit.

1. Petitioner contends that the government's evidence was insufficient to sustain the jury verdict (Pet. 16–19). It is settled that "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *E.g., Glasser* v. *United States*, 315 U.S. 60, 80 (conspiracy to defraud the United States); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810 (action under the Sherman Act). On the basis of a detailed review of the evidence in light of the above standard[3] (Pet. 44), the court of appeals correctly concluded that the evidence was sufficient to support the jury's verdict. The evidence before the jury is summarized in the court's opinion at Pet. 43–44, 49–50.

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[2] Petitioner is not raising before this Court its claim that the grand jury panel had been illegally selected (see Pet. 2–3).

[3] Petitioner's contention that the court of appeals should have reviewed the evidence in light of "[t]he Government's burden of proving a defendant guilty beyond a reasonable doubt . . ." (Pet. 14) confuses the proper standard for review purposes with the standard applicable at trial. Moreover, petitioner's

The indictment charged that the conspirators had fixed and established non-competitive prices and discounts for sales of milk to two large customers, the Offutt Air Force Base and the Veterans Hospital, both located in the Omaha area (Pet. 28, fn. 1). However, since general milk prices in the area "were the base points from which bid discounts were measured" (Pet. 44), it was incumbent upon the government to establish the area prices. For that purpose evidence of prices in the general Omaha area was introduced, and, as petitioner admits (Pet. 9, 19), it was shown that these prices "were uniform".[4] In this connection the government introduced the testimony of Beatrice's Omaha Manager, Mr. Klesath, as to conversations he had had with Roberts' sales manager in which

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claim that the court of appeals applied "an affirmatively adverse" (ibid.) test, which would require the defendant to exculpate itself, ignores the fact that the court expressly applied the proper standard (see Pet. 44). The phrase relied upon by petitioner is extracted from the court's statement, "[w]e cannot say that that evidence * * * was not sufficient to sustain the jury's verdict or that it was so affirmatively adverse as to necessitate an acquittal" (Pet. 49). The latter phrase appears to have been used to indicate the court's judgment that the testimony of one of Roberts' and one of Alamito's officials to the effect that independent judgment was used in bidding for government business (Tr. 99–103, 176–177) was insufficient, in light of all the evidence, to require a judgment of acquittal.

[4] It is stated by petitioner that such uniformity was necessary because of a federal milk marketing order which required the conspirators to pay "identical" prices for raw milk (Pet. 9). In fact, the milk order in question only set minimum prices (see Tr. 133–134); and, of course, even identical acquisition costs would not require identical sales prices or disprove an agreement to maintain noncompetitive prices.

they agreed upon uniform prices for the general area (Tr. 74–85; see Pet. 9).[5]

Proceedings from this foundation, the government then adduced proof of collusive action to fix non-competitive prices and discounts on sales to the two government installations which rested largely on documentary evidence contrasting the bidding practices of Beatrice, Roberts, and Alamito during the period of the conspiracy with their bidding practices before and after that period.

A. Pre-Conspiracy Period

The government introduced evidence showing that from early in 1951, when the Veterans Hospital in the Omaha area was first opened, to about April of 1954, Beatrice, Roberts, and Alamito had been vigorous competitors for the fluid milk business at the Air Base and the Hospital. The winning bids were awarded on discounts that ranged from zero to 10 percent, and each dairy shared in the business at both institutions.

Veterans Hospital. For each of the ten contract periods extending from April 1, 1951 to March 31, 1954, each defendant submitted a bid for the Hospital's business (Pet. 43). Beatrice was the successful

[5] Petitioner has repeatedly referred to the introduction into evidence of these conversations as gross error since, in its view, they did not relate to the charged conspiracy (Pet. 9–10, 19–20). But, as the court of appeals stated (Pet. 50): "Although the Klesath conversations had to do with matters affecting the area generally and were not directed specifically to business at the Base and the Hospital, the pricing at the latter was dependent on the former."

bidder on four occasions with discount offers of 1 percent, 4½ percent and 5 percent twice (*ibid.*).[6] Alamito also received the contract four times: twice at no discount, once at 3 percent, and once at 10½ percent (*ibid.*). Roberts received the award twice on offers of 1 percent and 2 percent discounts (*ibid.*).

Air Base. Bidding at the Air Base was similarly competitive for the eight contract periods from 1952 to 1954. Beatrice won four contracts by offering discounts of 2 percent twice, 3½ percent, and 5 percent (Pet. 43). Roberts was successful twice, bidding zero and 3.96 percent (*ibid.*). Although Alamito, in contrast to the others, offered no discounts during the pre-conspiracy period, it twice obtained the contract by offering lower net prices than either Beatrice or Roberts (Pet. 43; GX 6, 45).

B. CONSPIRACY PERIOD

From about March 1954 to about April 1957 bids to the government institutions reflected a design to divide the business and a rigidly uniform pattern in which all winning bids except one were at a 2 percent discount.

Veterans Hospital. For a three and one-quarter year period, from April 1, 1954 to June 30, 1957—or eight consecutive contract periods—Roberts, alone, obtained the hospital business; and, with but one minor exception, the bid was a 2 percent discount off wholesale price (Pet. 43; GX 46).[7] Beatrice offered no dis-

[6] On one occasion Beatrice offered a discount of 7½ percent but was outbid by Alamito (Pet. 43; see GX 5).

[7] On one occasion a 1½ percent discount for six months was accepted as an alternative to a 2 percent discount for twelve months (Pet. 43).

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counts during the period, except for a single unsuccessful offer of 1 percent in January 1955 (Pet. 7), although it had won the contract for the period immediately preceding the conspiracy with a bid of a 5 percent discount (*ibid.*). Alamito, which could have won every contract at the hospital by merely matching Roberts' 2 percent bids,[8] offered no discounts throughout the entire period, although previously it had bid as high as 10½ percent (Pet. 45).

Air Base. With Roberts secure in its exclusive enjoyment of the hospital business, Beatrice and Alamito divided the Air Base business.[9] This division was accomplished by a virtually perfect rotation of the contract between Beatrice and Alamito, the winner always bidding 2 percent, and the loser usually offering either no discount or a 1 percent discount (Pet. 6). The possibility of coincidence is virtually ruled out by the fact that, as noted above, Alamito could have won any of the bids merely by matching Beatrice's bid. Further, in the contract period preceding the conspiracy, Beatrice had won the contract with a discount of 5 percent, and Alamito had offered no discounts at all until the conspiracy began. Roberts offered no discounts throughout the period of

[8] Alamito qualified as a "small business" under government regulations which would have permitted it to have obtained any contract at the government installations by matching the bids of its competitors (see Tr. 111–113).

[9] Since the dollar volume of fluid milk purchased at the Air Base at the beginning of the conspiracy period was almost exactly twice that at the Veterans Hospital (GX 44; see Tr. 260), the conspirators' arrangement resulted, at least at that time, in each obtaining one-third of the total fluid milk business at the two government institutions.

the conspiracy (Pet. 6), although it had earlier bid as high as 3.96 percent and had twice obtained the Air Base contract (Pet. 43).

The parties' uniform and reciprocal pattern of bidding at the Air Base and the Hospital during the conspiracy period contrasted with their pattern of bidding for similar business at other institutions in Omaha. For example, in bidding for contracts at the University of Nebraska Hospital during the conspiracy (Pet. 8), Beatrice offered three discounts of 10 percent, one of 6½ and one of 5 percent. Roberts and Alamito both offered discounts varying from zero to 15 percent. See fn. 13, *infra*.

C. POST-CONSPIRACY PERIOD

After the beginning of the investigation which culminated in the return of the indictment, the bidding pattern once again shifted.

Veterans Hospital. On July 1, 1957, Alamito, for the first time in more than three and one-half years, offered a 2½ percent discount (Pet. 43) and took the business which Roberts had enjoyed for eight successive contracts. Beatrice also broke the pattern by obtaining the award on a 5 percent discount for the contract period beginning July 1, 1958 (*ibid.*). Roberts then retrieved the business for the following period with an offer of a 10 percent discount (*ibid.*).

Air Base. Shortly after the commencement of the government investigation, Roberts submitted a bid to the Air Base for the bid period beginning June 1, 1957, that amounted to a discount of 8 percent for a portion of the contract (Pet. 43), even though in the preceed-

ing three and one-half years Roberts had offered the Air Base no discount whatever. Beatrice abandoned its usual 2 percent bid and offered approximately 4 percent off wholesale for the contract period from December 1, 1957 to May 31, 1958 (Pet. 43–44), and in the next period the net prices offered by both Beatrice and Alamito for gallons of milk were approximately 5 percent below list price (*ibid.*).

The court of appeals' ruling accords with the decision of this Court in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208. In that case, the Court, noting that the government had presented no direct evidence of collusive action, held that an illegal agreement was nevertheless established by "inferences drawn from the course of conduct of the alleged conspirators", to wit, the "substantial unanimity of action" taken by defendants. 306 U.S. at 221. In the instant case, the parties' bidding patterns and practices before, during, and after the conspiracy raise a compelling inference that the bids were collusive. Moreover, in the presence of such evidence, the "burden rested on [petitioner] of going forward with the evidence to explain away or contradict it", 306 U.S. at 226, and petitioner failed to proffer contradictory or explanatory evidence.[10]

[10] See also *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142; *United States* v. *Masonite Corp.*, 316 U.S. 265, 274–276. Petitioner's reliance on *United States* v. *Borden Co.*, 347 U.S. 514, is misplaced. In that case the Court merely held that on "the record * * * before us" the government has "not established a case under the Sherman Act". 347 U.S. at 516. Here, as we have shown above and the court of appeals pointed out (Pet. 54), the government's case "rises above [that] presented in *Borden*."

2. Petitioner argues that the district court's charge to the jury, considered in light of government counsel's summation, amounted to an instruction that the jury could find it guilty of a crime not charged in the indictment (fixing prices in the general Omaha market) (Pet. 2, 19–21). We recognize, of course, that a conviction "on a charge the grand jury never made" cannot stand. *Stirone* v. *United States*, 361 U.S. 212, 219. But, as the court of appeals concluded, no such contention can be supported on the facts of this case.

In the charge to the jury (Tr. 372–394, reprinted at Pet. 60–78), the district court (Judge Robinson) began its discussion of the applicable law by stating that the government had to establish "the crime charged in the indictment", and to prove it was committed "within the Judicial District of the State of Nebraska" (Pet. 61). Judge Robinson then quoted the indictment, which charged a conspiracy to fix noncompetitive prices and discounts for the sale of milk to the Air Base and Veterans Hospital in Omaha (Pet. 63). After discussing the Sherman Act and the law of conspiracy (Pet. 63–67), the court framed the issues before the jury (Pet. 67): "The question with you is whether or not Beatrice Foods Company has entered into an agreement to fix and establish prices and discounts on milk or to divide or allocate the bid business of supplying milk to Offutt Air Force Base and the Veterans Hospital". Judge Robinson next instructed the jury that a conspiracy to fix prices violated the antitrust laws (Pet. 67–69) and that, if the government had proved a price-fixing conspiracy "in interstate commerce within the Omaha area, you must

find them guilty notwithstanding the motives or purposes of the defendant" (Pet. 70). He then reiterated that the charged violation consisted of defendant's fixing non-competitive prices for "milk sold to Offutt Air Force Base or the Veterans Hospital" and pointed out that "[t]he mere fact that the Government was the customer or prospective customer in the transactions under examination is immaterial" (Pet. 70, 71). Judge Robinson concluded his charge with a discussion of the type and quantum of proof essential to a finding of guilt (Pet. 72–77).

Petitioner argues (Pet. 19–20) that the court's instructions to the jury went beyond the crime charged in the indictment because the court made two references to price-fixing in "the Omaha area" (Pet. 70).[11]

[11] The paragraphs in which mention was made of "the Omaha area" were, in their entirety as follows (Pet. 69–70):

"So ladies and gentlemen, whatever justification or motive, whether economic, benevolent, or otherwise, that price-fixing agreements may be said to have, the law does not permit inquiry into their reasonableness. Therefore, if you determine that the defendants agreed or conspired to fix, stabilize, or control prices, or agreed to maintain uniform and non-competitive prices of dairy products in interstate commerce within the Omaha area, you must find them guilty notwithstanding the motives or purposes of the defendant in so agreeing or acting.

"The Court has stated to you the purposes of the Sherman Antitrust Act and the restrictions under it, but has not intended to leave the impression that it is unlawful for dairy operators to sell dairy products at the same or uniform prices, nor is it unlawful for one dairy to meet the price of another dairy, whether the price is lower or higher. The mere fact that one or more of the dairies involved here may have promptly met the price of another, or that there was a simultaneous price change, if such is the evidence in your opinion, is not sufficient to warrant you in returning a verdict of guilty. Before you can convict the defendant on trial in this case you must find

But at this point in the charge the court was explaining that a conspiracy to fix prices is illegal *per se* and cannot be justified and that a verdict of guilty could be rendered only upon a finding that the non-competitive pricing policies of Beatrice had resulted from a conspiracy. The district judge had already made the point clear—in the introduction, in the reading of the indictment, and in the paragraph in which he framed the issue—that the prices in question were those to the Air Base and the Veterans Hospital. In the passages relied upon by petitioner, the court was in no way concerned with precisely delimiting the scope of the charged violation. When read as a whole, as they must be (*e.g., Northcraft* v. *United States,* 271 F. 2d 184, 188 (C.A. 8); *Anderson* v. *United States,* 262 F. 2d 764, 773 (C.A. 8), certiorari denied, 360 U.S. 929), the instructions "adequately present[ed] the issues in a form understandable to the jury" (Pet. 58), and made clear that the charged violation related only to the Air Base and Veterans Hospital. As the court of appeals held (Pet. 58):

> It seems clear to us * * * that the jury did not assume or understand that Beatrice was charged with anything other than a conspiracy directed solely to the Base and the Hospital or, to express it reversely, that it understood Beatrice was not charged with a conspiracy to fix uniform prices generally in the Omaha market. We are persuaded as to this by the court's and

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from the evidence, beyond a reasonable doubt, that any equality or uniformity of prices at a given time resulted, as the Court has stated, from a combination or conspiracy to fix, control or maintain prices of dairy products in the Omaha area."

> counsels' repeated emphasis upon the Base and the Hospital as the objects of the conspiracy. Also, the indictment was read to the jury and was specific in its confining aspects.[12] * * *

In holding that the district court's instructions to the jury could not fairly be read to permit the conviction of Beatrice for a crime not charged in the indictment, the court of appeals observed that "as to this, we have considered the government's closing arguments" (Pet. 58). Thus, the court of appeals rejected petitioner's suggestion, renewed here, that government counsel in his summation "departed entirely from the indictment" (Pet. 9–10, 19–20).

Actually, government counsel repeatedly described the nature of the charged violation with careful accuracy. At the outset of his argument to the jury, counsel pointed out that "the charge is that the Beatrice Foods Company, Alamito and Roberts were conspiring to fix prices *at two Government installations, and two, only; the Offutt Air Force Base and the Veterans Hospital*" (Tr. 328, emphasis added). He further stated that the defendant must be found guilty only if the jury concluded, beyond a reasonable doubt, that Beatrice was "engaged in price fixing in the sale of milk to these two Government institutions" (Tr. 329). Finally, in detailing the government's proof that Beatrice and the co-conspirators had fixed milk

[12] The district court's refusal to charge the jury, as requested by petitioner, that the sole issue is "whether the Government has proved the defendant guilty of the particular conspiracy defined in the indictment" (Pet. 79) is of no consequence. As shown above, the substance of that request was adequately covered in the charge as given.

prices and discounts to the above two institutions, he gave the members of the jury miniature copies of several charts introduced into evidence by the government (GX 42, 44, 45, 46, 52, 54, 55, 75, 76, 89)—all but one of which (GX 55) related only to discounts and prices offered to the Offutt Air Force Base and Veterans Hospital[13]—and analyzed them for the remainder of his argument(see Tr. 337–348). While he also discussed evidence relating to the parties' identical prices in the Omaha area in January 1957, and noted that this indicated a general price fixing scheme at that time as well as on an earlier occasion (Tr. 330–334), this discussion was merely background for the argument addressed to the specific charge in the indictment. Thus his argument moved to the issue at trial (Tr. 334): "But that isn't the end of the story. Those prices which were fixed were carried over to the bids made to the Veterans Hospital and Offutt. Those same prices that were fixed in the manner they were fixed appeared on the bid sheets, as we shall see when we discuss the charts."

Because it was necessary for the United States to prove the uniform base prices from which the non-competitive discounts to the Air Base and the Veterans Hospital were computed (see Pet. 58), in order to establish that the non-competitive discounts affected

[13] GX 55 showed the discounts offered by Roberts, Alamito, and Beatrice to the University of Nebraska Hospital from June 1954 through June 1957, but did not list or refer to milk prices in the general Omaha market. It was introduced to show that while the conspirators allocated among themselves the business at Offutt and the Veterans Hospital, they were "actively bidding" for sales to the University (see Tr. 342-343).

the ultimate awards, it was proper for government counsel to comment on the base prices in the summation. His opinion on the legality of the methods used to establish the general area prices could not have confused the jury as to the nature of the alleged violation, for, as pointed out above, government counsel had repeatedly made clear in his argument that the charged crime involved only the "bids made to the Veterans Hospital and Offutt" (Tr. 334). Moreover, as the court of appeals observed (Pet. 58), the government's "evidence itself was overwhelmingly directed to the two institutions", and the district court's instruction adequately delineated the limited scope of the charged violation.[14]

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[14] Petitioner's contention that the court of appeals "fail[ed] to consider the cumulative prejudice of multiple evidentiary and instructional errors" (Pet. 2, 21-24) is misplaced. The short answer is that there were no such multiple errors. We have shown above, and the court of appeals held (Pet. 57-59), that the trial judge's instructions to the jury were proper. In the section of its opinion headed "*Errors in the reception of evidence*", the court held that only *one* item of hearsay testimony was improperly admitted, and found that any prejudicial effect such testimony might have had was cured by the fact that the district court, "on its own motion, struck that testimony and directed the jury to disregard it" (Pet. 56). As to one other item of evidence, while the court of appeals had some "doubt" about admissability, it held that "we are not convinced that, if its admission was error, there was resulting prejudice" (Pet. 57). On the record in this case, therefore, the court of appeals was clearly correct in refusing to reverse for procedural errors. Errors "which do not affect the substantial rights of the parties" are not grounds for reversal and must be "disregarded". 28 U.S.C. 2111; Rule 52(a), F.R. Crim. P.; *Kotteakos* v. *United States*, 328 U.S. 750, 764-765; see *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Goins* v. *United States*, 99 F. 2d 147 (C.A. 4), certiorari dismissed, 306 U.S. 622.

3. More than two and one-half years after return of the indictment, on the day trial began, petitioner moved that the "grand jury minutes be produced for inspection by the defense and the court" and that the indictment be quashed because of misconduct of government attorneys before the grand jury (Pet. 38). The motion was supported solely by an affidavit of one of petitioner's attorneys. He asserted that 3 witnesses before the grand jury had recorded on tape immediately after testifying that the government attorneys, in front of the grand jury, had threatened them with prosecution for perjury and asserted that defendants had committed the crime being considered (*ibid.*). Neither the tapes nor affidavits of the witnesses were proffered. The district judge, after examining the grand jury transcript *in camera* and finding that the allegations in the affidavit "are not supported by the record and therefore are without foundation," denied the motion (Pet. 38; P.F. 177). The court of appeals affirmed, stating (Pet. 42): "We do not see in the allegations of this affidavit anything which suggests that the ends of justice require that the whole or any part of this [grand jury] transcript be made available to the defendant." The court of appeals noted that it also had carefully read the transcript (Pet. 42).

Petitioners' argument now seems to be that the *in camera* reading of the grand jury transcript by the courts below was "Star Chamber procedure" under which evidence was "received and weighed" against it in violation of its constitutional right to confrontation of adverse witnesses (Pet. 25). This contention is without merit, even apart from the fact that the

conviction here was by a jury which did not even see the transcript.

Grand jury proceedings are, and historically have been, confidential. *United States* v. *Johnson*, 319 U.S. 503; *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681–682 and fn. 6. Rule 6(e), F.R. Crim. P., sets forth the only conditions under which federal courts can permit defendants to view grand jury minutes. Interpreting that rule, this Court has recently held, in upholding a district court's denial of an antitrust defendant's motion requesting disclosure, that "Rule 6(e) is but declaratory" of the established principle that disclosure is "committed to the discretion of the trial judge." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (footnotes omitted). And the burden is on the moving defendant to establish that "a particularized need" exists for the minutes. *Id.* at 400.

The court of appeals here held that the trial court's denial of petitioner's motion "was not an abuse of discretion" (Pet. 42) since Beatrice did not establish a particularized need for the grand jury transcript (Pet. 41). In support of this conclusion the Eighth Circuit cited the following facts (Pet. 40–41): (1) although the affidavit of petitioner's counsel alleged that that witnesses' statements were made "immediately" after testifying before the grand jury, the motion was not made until more than two and one-half *years* after the indictment was returned, (2) no supporting affidavit from any of the three witnesses was presented, (3) the complaining witnesses, all of whom were agents or employees of Roberts, were only three

of many appearing before the grand jury, (4) recorded statements were taken from some of the other witnesses, but the affidavit contained no similar reference to any of those, and (5) one of the three witnesses testified at the trial.

The fact that the district court and the court of appeals, out of an abundance of caution, undertook to examine the grand jury transcript, although they need not have done so,[15] does not make petitioner's case any stronger. It can hardly complain that its motion received closer scrutiny than it was entitled to.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the petition for a writ of certiorari should be denied.

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APRIL 1963.

[15] Part of the district court's discretion in passing on motions under Rule 6(e) is the determination whether *in camera* inspection of the grand jury minutes is warranted. *E.g., Pittsburgh Plate Glass Co.* v. *United States*, 260 F. 2d 397, 404 (C.A. 4), affirmed, 360 U.S. 395; *Brilliant* v. *United States*, 297 F. 2d 385, 391 (C.A. 8), certiorari denied, 369 U.S. 871.

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